

UNITED STATES OF AMERICA
U.S. DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD
Complainant

vs.

LEONARD ALLEN PATTERSON JR
Respondent

Docket Number 2013-0335
Enforcement Activity No. 4707071

NOTICE OF ERRATA

This is a notice to correct the following on the Decision & Order issued by the court on May 13, 2014 in the above entitled case:

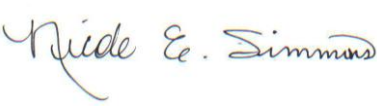
THE FIRST PARAGRAPH READS:

The United States Coast Guard **Sector New Orleans** (Coast Guard) initiated the instant administrative action seeking revocation of Respondent Leonard Allen Patterson, Jr.'s (Respondent) Coast Guard-issued Merchant Mariner's Credential (MMC).

IT SHOULD READ:

The United States Coast Guard **Sector Jacksonville** (Coast Guard) initiated the instant administrative action seeking revocation of Respondent Leonard Allen Patterson, Jr.'s (Respondent) Coast Guard-issued Merchant Mariner's Credential (MMC).

Done and dated this 14th day of May, 2014 at
New Orleans, Louisiana


<hr/>
Paralegal Specialist US Coast Guard Administrative Law Judge
Date: <input type="text" value="May 14, 2014"/>

UNITED STATES OF AMERICA
U.S. DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

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Complainant

v.

LEONARD ALLEN PATTERSON, JR.

Respondent

Docket No: 2013-0335
CG Enforcement Activity No: 4707071

DECISION & ORDER

Date Issued: May 13, 2014

Issued by: Hon. Bruce Tucker Smith
Administrative Law Judge

Appearances:

For the Complainant

Gary Ball, Esq.
CWO Greg E. Cable

For Respondent

Thomas A. Boyd, Esq.

I. PRELIMINARY STATEMENT

The United States Coast Guard Sector New Orleans (Coast Guard) initiated the instant administrative action seeking revocation of Respondent Leonard Allen Patterson, Jr.'s. (Respondent) Coast Guard-issued Merchant Mariner's Credential (MMC). The instant action is brought pursuant to the legal authority codified at 46 USC §7703(1)(B) and 46 CFR §5.27 (Misconduct).

On September 6, 2013, the Coast Guard filed an original Complaint alleging that on August 16, 2013, Respondent reported to a properly designated medical testing facility for a pre-employment chemical test of his urine. The Complaint further alleges that the Respondent provided a urine sample which failed the requisite standards of 49 CFR §40.65. The Complaint further alleges that thereafter, the designated urine specimen collector directed Respondent to provide a second urine specimen, per the provisions of 49 CFR §40.65(b)(5) and 49 CFR §40.67(c)(3). The Complaint then alleges that Respondent failed to provide the second sample and wrongfully departed the specimen collection facility, prior to the completion of the collection process, which constitutes Misconduct per the provisions of 46 CFR §5.27. The Complaint failed to identify which "formal, duly established rule" Respondent breached by his failure to remain at the testing facility. However, the court presumes the Coast Guard intended that 49 CFR §40.191(a)(2) & (3) were the "formal, duly established rules" and further notes that Respondent did not object to the deficiency in the Complaint either before, or at the time of trial.

Based upon the foregoing allegations, the Coast Guard sought revocation of Respondent's credential as an appropriate sanction.

On January 28, 2014, this matter came on for hearing in Bankruptcy Court, Middle District of Florida, in Jacksonville, Florida. The proceeding was conducted in accordance with the Administrative Procedure Act (APA), as amended and codified at 5 USC §§551-59, and the Coast Guard procedural regulations set forth at 33 CFR Part 20. Coast Guard attorney Gary Ball, Esq. and investigating officer

CWO Greg E. Cable appeared on behalf of the Coast Guard. Respondent was represented by attorney Thomas A. Boyd, Esq.

Both parties appeared, presented their respective cases, and rested. Three witnesses testified as part of the Coast Guard's case-in-chief and the Coast Guard offered seven exhibits into evidence, six of which were admitted.¹ Respondent testified on his own behalf.

The parties were afforded the opportunity to submit written closing arguments; thereafter, the court closed the administrative record.

II. FINDINGS OF FACT/CONCLUSIONS OF LAW

The Findings of Fact are based on a thorough and careful analysis of the documentary evidence, testimony of witnesses and the entire record taken as a whole, including party stipulations.

1. At all relevant times mentioned herein, Respondent Leonard Allen Patterson, Jr. was the holder of, and acting under the authority of, a Coast Guard-issued Merchant Mariner's Credential (credential). (CG Ex. 1). See also, Appeal Decision 2694(LANGLEY)(20111).
2. On August 16, 2013, Respondent Leonard Allen Patterson, Jr. reported to a properly designated medical testing facility at Memorial Occupational Health, Jacksonville, Florida for a pre-employment chemical test of his urine, before enrolling in a Seafarers Union training program. (Tr. 27 – 28, 30 – 31, 49; CG Ex. 4).
3. On August 16, 2013, at approximately 11:20 am, Respondent Leonard Allen Patterson, Jr. presented himself to Patricia Ann Hastings, a properly-certified Department of Transportation Drug Test Collector, per the provisions of 49 CFR Part 40, for the purpose of submitting a urine specimen for testing. (Tr. 51; CG Ex. 3).
4. On August 16, 2013, Respondent Leonard Allen Patterson, Jr., produced a urine specimen in a properly designated urine specimen collection cup, pursuant to guidance given to him by specimen collector Patricia Ann Hastings. (Tr. 52).
5. On August 16, 2013, specimen collector Patricia Ann Hastings noted that the sample provided by Respondent Leonard Allen Patterson, Jr., was unusually

¹ Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. at ___). Citations referring to Coast Guard Exhibits are as follows: Coast Guard followed by the exhibit number (i.e., CG Ex. 1, etc.); Respondent's Exhibits are as follows: Respondent followed by the exhibit letter (Resp. Ex. A, etc.); ALJ Exhibits are as follows: ALJ followed by the exhibit Roman numeral (ALJ Ex. I, etc.).

warm to the touch and that the same specimen failed to register within a proper temperature range for urine specimen testing. (Tr. 53 – 58).

6. On August 16, 2013, specimen collector Patricia Ann Hastings then informed Respondent Leonard Allen Patterson, Jr., that his specimen was unacceptable for testing and that he would have to provide a second specimen, under appropriate medical observation. (Tr. 59).

7. On August 16, 2013, specimen collector Patricia Ann Hastings further informed Respondent Leonard Allen Patterson, Jr., that he could not leave the testing facility before completing the test – by providing a second specimen, under appropriate medical observation. (Tr. 62 – 64).

8. On August 16, 2013, Napoleon G. DePadua, MD was employed as a physician at Memorial Occupational Medical in Jacksonville, Florida. On that day spoke, clinically, with the Respondent. Dr. DePadua told Respondent that he had to provide a second urine specimen, under medical observation, because his first sample was unacceptable. (Tr. 126 – 127).

9. On August 16, 2013, at approximately 1:00 pm, and in contravention to specimen collector Patricia Ann Hastings’ specific guidance, Respondent Leonard Allen Patterson, Jr., departed medical testing facility at Memorial Occupational Health, Jacksonville, Florida without having provided the required second urine specimen. (Tr. 66; CG Ex. 5).

10. By virtue of Respondent’s departure from the specimen collection facility before completing the urine specimen collection process, Respondent committed an act of Misconduct. 49 CFR §40.191; 46 CFR §5.27.

III. SUMMARY OF DECISION

The instant matter is governed by the interplay of 46 USC §7703(1)(B), 46 CFR §5.27 (Misconduct) and 46 CFR Part 16, Subpart B. The statute provides that a mariner’s document may be suspended or revoked if that mariner has committed an act of Misconduct. The regulation, in turn, defines “Misconduct” as “human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations It is an act which is forbidden or a failure to do that which is required.” 46 CFR §5.27. Herein, Respondent is (essentially) charged with refusal to test by wrongfully departing the medical testing facility in violation of 49 CFR §40.191(a)(2), an act of Misconduct.

For the reasons discussed herein, the Coast Guard **PROVED** by a preponderance of reliable, probative and credible evidence that Respondent Leonard Allen Patterson, Jr., committed an act of Misconduct.

IV. DISCUSSION

A. General

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. See 46 USC §7701. Pursuant to 46 CFR §5.19, an ALJ holds the authority to suspend or revoke a license or certificate in a hearing for violations arising under 46 USC §7703.

Determining the weight of the evidence and making credibility determinations as to the evidence is within the sole purview of the ALJ. See Appeal Decision 2640 (PASSARO) (2003).² Additionally, the ALJ is vested with broad discretion in resolving inconsistencies in the evidence, and findings do not need to be consistent with all of the evidence in the record as long as there is sufficient evidence to reasonably justify the findings reached. Id.; Appeal Decision 2639 (HAUCK) (2003).

B. Jurisdiction

“The jurisdiction of administrative bodies is dependent upon the validity and the terms of the statutes reposing power in them.” Appeal Decision 2620 (COX) (2001) (quoting Appeal Decision 2025 (ARMSTRONG) (1975)). “Where an Administrative forum acts without jurisdiction its orders are void.” Appeal Decision 2025 (ARMSTRONG) (1975). Therefore, establishing jurisdiction is critical to the validity of a proceeding. Appeal Decisions 2677 (WALKER) (2008); 2656 (JORDAN) (2006). Jurisdiction is a question of fact that must be proven. Appeal Decisions 2620 (Cox) (2001); 2425 (BUTTNER) (1986); 2025 (ARMSTRONG) (1975) (stating “jurisdiction must be affirmatively shown and will not be presumed”).

² Pursuant to 46 CFR §5.65, “[t]he decisions of the Commandant in cases of appeal . . . are officially noticed and the principals and policies enunciated therein are binding upon all Administrative Law Judges.”

In the instant case, the Coast Guard proved that at all relevant times mentioned herein Respondent Leonard Allen Patterson, Jr., was the holder of a Coast Guard-issued Merchant Mariner's Credential (credential) and that he was acting under the authority of that credential when he presented himself for medical testing of his urine sample. The court agrees with the Coast Guard in its assertion that Respondent was acting under the authority of his credential when he reported to Memorial Occupational Health to take a Coast Guard-required pre-employment drug test. See Appeal Decision 2694 (LANGLEY)(2011).

C. Burden of Proof

In this case, like all Suspension and Revocation cases, the Coast Guard bears the burden of proof to establish the requisite facts mandated by the organic statute, 46 USC §7703, and the implementing regulations, 46 CFR Part 5; Part 10, Subpart B; 33 CFR Part 20. The Administrative Procedure Act (APA), 5 USC §§551-559, applies to Coast Guard Suspension and Revocation hearings before United States ALJs. The APA authorizes imposition of sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative and substantial evidence. See 5 USC §556(d). The Coast Guard bears the burden of proof to establish the charges are supported by a preponderance of the evidence. 33 CFR §§20.701, 20.702(a). Similarly, a respondent bears the burden of proof in asserting his affirmative defense by a preponderance of the evidence. 33 CFR §§20.701, 20.702; Appeal Decisions 2640 (PASSARO) (2003); 2637 (TURBEVILLE) (2003). "The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court." Appeal Decision 2477 (TOMBARI) (1988) (citing Steadman v. SEC, 450 U.S. 91, 107 (1981)). The burden of proving a fact by a preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe & Products of Cal., Inc. v.

Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 622 (1993) (quoting In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (brackets in original)).

D. Discussion of the Evidence

1. Respondent's Refusal to Test

Pursuant to 49 CFR §40.191(a)(2), a marine employee is deemed to have “refused to take a drug test” when that mariner fails to remain at the testing site until the testing process is complete. The evidence reveals that, in this case, Respondent’s initial sample was deemed insufficient by the testing official. That official informed Respondent he was to provide a second sample in order to complete the testing process. In this regard; he failed.

The undisputed evidence reveals that on August 16, 2013, Respondent Leonard Allen Patterson, Jr. reported to a properly designated medical testing facility at Memorial Occupational Health, Jacksonville, Florida for a pre-employment chemical test of his urine. (Tr. 49). At approximately 11:20 am, Respondent presented himself to Patricia Ann Hastings, a properly-certified Department of Transportation Drug Test Collector, per the provisions of 49 CFR Part 40, for the purpose of submitting a urine specimen for testing. (Tr. 51; CG Ex. 3).

Then, pursuant to guidance given to him by specimen collector Patricia Ann Hastings, Respondent produced a urine specimen in a properly designated urine specimen collection cup. (Tr. 52). Respondent then handed his specimen cup to Ms. Hastings, who noted that Respondent’s sample was unusually warm to the touch and that the same specimen failed to register within a proper temperature range for urine specimen testing. (Tr. 53 – 58).³

Thereafter, Ms. Hastings informed the Respondent that his specimen was unacceptable for testing and that he would have to provide a second specimen, under appropriate medical observation.

³The court notes that the specimen collector, Patricia Ann Hastings, committed two administrative errors in the testing process: she placed a thermometer into the specimen in the collection bottle in violation of 49 CFR §40.65(b)(2) (Tr. at 57) and that, rather than disposing of the initial specimen, she mailed same to the testing facility

(Tr. 59). See 49 CFR §40.65(b). Moreover, Ms. Hastings told Respondent that he could not leave the testing facility before completing the test – by providing a second specimen, under appropriate medical observation. (Tr. 62 – 64).

Dr. Napoleon G. DePadua testified that on August 16, 2013, he was employed as a physician at Memorial Occupational Medical and on that day spoke, clinically, with the Respondent. Dr. DePadua explained to Respondent that he had to provide a second urine specimen, under medical observation, because his first sample was unacceptable. (Tr. 126 – 127). Again, the testing process would not be complete until Respondent provided a second, acceptable sample.

The clear evidence establishes that Respondent departed the testing facility before providing the second urine sample under direct medical observation. (Tr. 66). Respondent admitted that the “nurse” (specimen collector Patricia Ann Hastings) had directed him to remain at the testing facility until he had completed the testing process by providing a second sample under appropriate medical observation. (Tr.161). Respondent further admitted that he was also directed to stay at the testing facility until he had completed his testing, by a representative of the Jacksonville Maritime Union. (Tr.159). Finally, Respondent testified that he left the testing facility without providing the required second sample. (Tr. 164).

2. Refusal to Submit a Urine Specimen Constitutes Misconduct

Pursuant to 46 CFR §5.27, “Misconduct is human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes [and] regulations, It is an act which is forbidden or a failure to do that which is required.” *Id.* Respondent’s premature departure from the testing facility constitutes a refusal to take a DOT test, in violation of 40 CFR §40.191(a)(2) & (3). This is Misconduct per the provisions of 46 CFR §5.27.

V. SANCTION

in violation of 49 CFR §40.65(b)(7). (Tr. at 111). Neither error was causative of Respondent’s untimely departure from the testing facility.

The authority to impose sanctions at the conclusion of a case is exclusive to the Administrative Law Judge. 46 CFR §§5.567; 5.569(a); Appeal Decision 2362 (ARNOLD) (1984). The nature of this non-penal administrative proceeding is to “promote, foster, and maintain the safety of life and property at sea.” 46 U.S.C. §7701; 46 CFR §5.5; Appeal Decision 1106 (LABELLE) (1959). Therefore, the decision of an appropriate sanction is one of the most crucial aspects of a court’s resolution of a Suspension and Revocation hearing.

Title 46 CFR § 5.596(b) provides, “[e]xcept for acts or offenses for which revocation is mandatory, factors which may affect the order include: (1) Remedial actions which have been undertaken independently by the respondent; (2) Prior record of the respondent, considering the period of time between prior acts and the act or offense for which presently charged is relevant; and (3) Evidence of mitigation or aggravation.”

In this case, the Coast Guard seeks revocation. Table 5.569 identifies the offense of “Refusal to Take Chemical Drug Test” and suggests a suspension ranging between 12 and 24 months.

In an effort to promote uniform orders in Coast Guard Suspension and Revocation proceedings, Table 5.569 serves as a guide to Administrative Law Judges. The Table is a suggested range of appropriate orders for various types of offenses prior to considering matters in mitigation or aggravation. 46 CFR § 5.596(d). Orders issued within the Table’s range are not considered excessive but orders may be greater or less depending on the existence of aggravating or mitigating facts or repeat offenders. However, Table in 5.569 shall, “not affect the fair and impartial adjudication of each case on its individual facts and merits. 46 CFR §5.569(d); Appeal Decision 2628 (VILAS) (2002), aff’d by NTSB Docket ME-174. Id.

The Coast Guard proved Respondent committed misconduct for failing to provide a second urine sample and wrongfully departing the collection facility prior to the completion of the pre-employment chemical test. The Coast Guard proposed a sanction of revocation for Respondent’s act of misconduct. Here, the court must decide whether revocation is an appropriate sanction. The analysis begins with 46

CFR § 5.569(b) since revocation is not mandatory for this offense; subsequently the court will turn to Table 5.596 for additional guidance.

Only one of the three factors listed in section 5.596(b) is present in the case at bar; respondent's prior record. Neither party offered any evidence pertaining to Respondent's efforts at remediation or mitigating/aggravating evidence. However, the court notes that Respondent's prior records reveal that his credential was the subject of a Coast Guard Complaint, filed July 11, 2012, based upon a conviction in a Florida state criminal court for the possession of more than 20 grams of cannabis, a controlled substance and a dangerous drug as defined by Florida Statute, Title XLVI, Chapter 893.13(6)(a). That Complaint resulted in a Settlement Agreement between the Coast Guard and Respondent. (CG Ex. 7). Interestingly, the terms of that Settlement Agreement provided that Respondent was subject to unannounced drug testing for a period of sixty months, commencing on July 23, 2012. Hence, Respondent was on adequate notice that he was required to comport himself with the provisions of 49 CFR §40.191(a)(2) for reasons beyond that which caused him to be present at the testing facility on August 16, 2013.

Thus, Respondent's prior record clearly reveals a history of criminal involvement with marijuana. The instant Complaint describes a drug testing event well within the same time period referenced in the prior Settlement Agreement. Thus, Respondent was on "double notice" of his obligation to participate meaningfully in ANY required drug testing.

Table 5.596 provides a 12 - 24 month suspension for refusal to take a chemical test however, an order for repeat offenders can be greater than the range found in the Table. See 46 CFR § 5.596(d) and Commandant v. Taylor, NTSB Order No. EM-174 (1993) (affirming decision to revoke license of mariner who lacked respect for authority and lacked willingness to conform behavior to the requirement of law by continuing to operate a vessel during the suspension of his license). The court concludes that the regulations, case law and individual facts of the case warrant an order revoking Respondent's

credential.⁴ A sanction less than revocation would indeed encourage repeat offenders attempt to evade testing and undermine the government's compelling interest in maintaining safety at sea.

VI. CONCLUSION


For the reasons discussed above, the Coast Guard **PROVED** by a preponderance of reliable, probative and credible evidence that Respondent Leonard Allen Patterson, Jr., committed an act of Misconduct by his refusal to submit a urine specimen when lawfully directed to do so.

WHEREFORE,

VII. ORDER

IT IS HEREBY ORDERED, that the allegations contained in the Coast Guard's Complaint were **PROVED** and that Respondent's credential is **REVOKED**. The Coast Guard will undertake appropriate and timely measures to ensure retrieval of Respondent's credential.

PLEASE TAKE NOTE, that issuance of this Decision and Order serves as notice of the parties' right to appeal under 33 CFR Part 20, Subpart J. A copy of Subpart J is provided as Attachment B.



Bruce Tucker Smith
US Coast Guard
Administrative Law Judge

Date:

⁴ Title 46 CFR 5.569... “[t]his Table should not affect the fair and impartial adjudication of each case on its individual facts and merits.”

ATTACHMENT A – EXHIBIT & WITNESS LIST

COAST GUARD EXHIBITS

1. RESPONDENT’S MERCHANT MARINER CREDENTIAL
3. PATRICIA HASTINGS TRAINING CERTIFICATE
4. CUSTODY AND CONTROL FORM, PART 3
5. CUSTODY AND CONTROL FORM, PART 1
6. COMPREHENSIVE HEALTH SERVICES CHECKLIST
7. COMPLAINT AND SETTLEMENT AGREEMENT

COAST GUARD WITNESSES

1. KENNETH MILLER
2. PATRICIA HASTINGS
3. NAPOLEON DEPADUA

RESPONDENT WITNESSES

- A. LEONARD ALLEN PATTERSON, JR.

ATTACHMENT B – NOTICE OF ADMINISTRATIVE APPEAL RIGHTS

33 CFR 20.1001 General.

- (a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.
- (b) No party may appeal except on the following issues:
 - (1) Whether each finding of fact is supported by substantial evidence.
 - (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
 - (3) Whether the ALJ abused his or her discretion.
 - (4) The ALJ's denial of a motion for disqualification.
- (c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.
- (d) The appeal must follow the procedural requirements of this subpart.

33 CFR 20.1002 Records on appeal.

- (a) The record of the proceeding constitutes the record for decision on appeal.
- (b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --
 - (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
 - (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

33 CFR 20.1003 Procedures for appeal.

- (a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.
 - (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --
 - (i) Basis for the appeal;
 - (ii) Reasons supporting the appeal; and
 - (iii) Relief requested in the appeal.
 - (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.
 - (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.
- (b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If

the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.

(c) No party may file more than one appellate brief or reply brief, unless --

(1) The party has petitioned the Commandant in writing; and

(2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.

(d) The Commandant may accept an amicus curiae brief from any person in an appeal of an ALJ's decision.

33 CFR 20.1004 Decisions on appeal.

(a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.

(b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.